

U.S. Department of Labor

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Issue date: 06Nov2001

Case Nos. 2000-BLA-00581
2000-BLA-00810

In the Matter Of

LINDA WELCH
Widow of John L. Welch
JOHN L. WELCH, c/o LINDA WELCH

Claimants,

v.

SOLDIER CREEK COAL CO.

Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:¹

Martin Linnet, Esq.
For the Claimant

Denise M. Davidson, Esq.
For the Employer

Before: **PAUL H. TEITLER**
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

These cases arise from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. § 901 *et seq.*, and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

¹ The Director, Office of Workers' Compensation Programs was not present or represented by counsel at the hearing.

On March 17, 2000, these cases were referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a hearing. (DX. 48).² A formal hearing in this matter was conducted on October 26, 2000, in Price, Utah, by the undersigned. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder.

ISSUES

The issues in these cases are:

- (1) Whether the person upon whose death or disability the claim is based is a miner,
- (2) Whether the Miner worked as a miner after December 31, 1969,
- (3) Whether the Miner worked at least fifteen years in or around one or more coal mines,
- (4) Whether the Miner had pneumoconiosis as defined in the Act and regulations,
- (5) Whether the Miner's pneumoconiosis arose out of coal mine employment,
- (6) Whether the Miner was totally disabled,
- (7) Whether the Miner's disability or death was due to pneumoconiosis,
- (8) Whether the named employer is the Responsible Operator, and,
- (9) Whether the evidence establishes a material change in conditions pursuant to 20 C.F.R. §725.309(c), (d).

(DX 48).

Employer has also raised several issues which are not properly before the undersigned. Those issues are noted and reserved. Based upon a thorough analysis of the entire record herein, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background:

The Miner, John L. Welch, was born on May 23, 1934, and he died on June 4, 1999.

^{2/} The following references will be used herein: "CX" designates Claimant's exhibits; "DX" designates Director's exhibits; "EX" designates Employer's exhibits; and "Tr." designates pages from the transcript of the hearing held before me on October 26, 2000.

(Tr. 18, DX 1, 31). He had a tenth grade education. (DX 1). The Miner had one dependent for purposes of augmenting benefits, namely his wife, Linda, whom he married on July 3, 1977. (Tr. 18, Dir. Ex. 1, 28). His widow, the Claimant herein, has no dependents for purposes of possible benefit augmentation under the Act. (DX 29).

The Claimant testified that her husband last worked as a coal miner in 1991. (Tr. 21). The miner was always short-winded, this having been the case for approximately eleven years prior to his death. (Tr. 21). It was a condition which had worsened over the years. (Tr. 22). From 1975 until his death, the Miner did not smoke cigarettes, as far as Claimant knew. (Tr. 20).

Mr. Loy Thomas, the Miner's half-brother, testified that he worked in the same mines as the Miner. (Tr. 35). The Miner could not walk from the parking lot to the bath house, less than 100 yards, without stopping to take a rest. (Tr. 43).

Procedural History:

The Miner filed his first claim for benefits on July 29, 1992. (DX 28). It was denied by the District Director on December 17, 1992. (DX 28). The Miner did not pursue that claim, however, on March 1, 1999, he filed his second application for benefits. (DX 1). While the claim was initially denied on August 6, 1999, on November 18, 1999, the Director issued a Notice of Initial Finding, determining that the Miner was entitled to benefits. (DX 25). On December 10, 1999, the Employer filed a timely controversion. (DX 25A).

The Miner's widow, Linda Welch, filed an application for survivor's benefits on August 31, 1999. (DX 29). She was initially found to be entitled to benefits by the Director on November 18, 1999, (DX 38), and Employer made a timely request for a hearing. (DX 39). This matter was then referred to the Office of Administrative Law Judges on March 17, 2000, and a hearing was held before the undersigned on October 26, 2000. (DX 48).

Applicable Regulations:

Because this claim was made after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. Revised regulations became effective on January 19, 2001, and are applicable to claims pending on that date. This provision regarding the applicability of the new regulations does not apply to several of the amended regulations, including those at 20 C.F.R. 725.309, 725.492, 725.493, 725.494 and 725.495. **See 20 C.F.R. 725.2.**

Length of Coal Mine Employment

The undersigned notes by the hearing of October 26, 2000, the parties stipulated the Miner worked 14 years and nine months in coal mine employment. (Tr. 20). This stipulation removes the issue of the length of the Miner's coal mine employment from this Decision. The parties stipulated, and I find, that John L. Welch was a coal miner within the meaning of §725.202 of the regulations for 14 years and nine months ending in 1991. (Tr. 20, 24).

Responsible Operator

The Employer herein contests that it was properly designated the responsible operator. (DX 48). The Social Security records clearly establish that the Miner worked for Soldier

Creek Coal Company (Soldier Creek) from 1985 through 1991. (DX 28, 30). In the Miner's first application for benefits, the Director served a Notice of Claim dated July 31, 1992, on Soldier Creek, in care of Sun Coal Company, with the insurance carrier also being listed as Sun Coal Company, Inc.³ (DX 28). A response was received from the law firm of Parson, Behle & Latimer on August 18, 1992, advising that it represented Soldier Creek, and in which its status as responsible operator was raised. Given that the claim was administratively closed, there was no adjudication of the issue of responsible operator.

Upon the Miner's second filing for benefits, the Director issued a Notice of Claim directed to Soldier Creek, care of Employers Service Co., (ESC), with the insurance carrier being listed as Coastal States Energy Co. (Coastal). (DX 14). ESC responded by advising that it did not serve as the third party administrator for Soldier Creek. (DX 15). The Director agreed, and released ESC from further involvement. (DX 17).

A Special Answer and Controversion was filed by Soldier Creek on April 6, 1999, in which it contested that it was the operator responsible for this claim. (DX 16). Meanwhile, the Director issued a Notice of Claim on June 30, 1999, listing Soldier Creek as the coal mine operator, in care of Underwriters Safety & Claims, with the insurance carrier being listed as Coastal. (DX 18). Soldier Creek filed a second Special Answer and Controversion on July 16, 1999, in which its status as responsible operator was again raised. (DX 19). In a letter dated August 24, 1999, counsel for Defendant requested the documentation utilized by the Department of Labor in naming Coastal as the responsible operator herein. (DX 24).

Upon the Claimant's filing of an application for widow's benefits, a Notice of Claim was issued, listing Soldier Creek as the coal mine operator, and Coastal as the insurance carrier. (DX 35). Employer again filed a Special Answer and Controversion, contesting its status as responsible operator, and specifically that the Miner was an employee of the firm and that the Miner's most recent period of coal mine employment was with it. (DX 36, 37). In a Notice of Rejection, filed on December 15, 1999, Employer contested that Coastal or its third party administrator, Underwriters Safety & Claims, was the insurer or the responsible party for Soldier Creek. (DX 39).

At the hearing held herein, the issue of responsible operator was again raised. Claimant testified that her husband worked for Soldier Creek when it was owned by Sun Coal. (Tr. 26). When asked whether the Miner worked for Soldier Creek when it was owned by Coastal, Claimant indicated that she thought he did, however, she was not sure. (Tr. 26). Claimant testified that when her husband received disability benefits through his employer, those payments were made by Coastal. She had no check stubs to that effect with her (Tr. 27).

Mr. Thomas testified at the hearing that he currently works for Soldier Creek, which is now owned by Canyon Fuel. (Tr. 35). Mr. Thomas testified that Coastal took over from Sun Oil on September 16, 1993. (Tr. 43-44). When Coastal bought out Sun Oil, Coastal assumed all of Sun Oil's employees, according to Mr. Thomas. (Tr. 44). He testified that Coastal paid

³In his first application for benefits, the Miner stated that he worked for Soldier Creek and that it was purchased in 1985 by "Sun Oil." He further indicated that he retired from Sun Oil on March 31, 1992. (DX 28). In an Employment History form he completed in 1992, the Miner listed coal mine employment with Soldier Creek from 1977 to 1991. (DX 28).

the Miner's retirement, because it assumed all the liabilities of Sun Oil. (Tr. 47). Claimant also confirmed that the retirement checks were from Coastal. (Tr. 48). Mr. Thomas explained that when Canyon Fuel bought out Coastal, Coastal retired everyone who was fifty-five years of age or older. (Tr. 44). According to Mr. Thomas, he now receives retirement benefits from Coastal.

At the hearing, in order to resolve this issue, the undersigned asked the Claimant to submit tax returns, with W-2's attached within thirty days. (Tr. 31, 33-34). Employer's counsel was requested to write a letter to the current owner of Soldier Creek, in order to ascertain when the current owner took over the liabilities of its predecessor. (Tr. 44-45).

Neither party has submitted the evidence requested, regarding the responsible operator issue. They did raise the issue, however, in their respective post-hearing briefs. The Employer provided one paragraph on the issue in its twenty-eight page brief, stating therein that the Miner did not work for Soldier Coal after the company was purchased by Coastal, and that there had been no establishment in the record that Coastal was correctly named as the responsible operator. The Claimant contended in its post-hearing brief that Sun Oil owned Soldier Creek at the time the Miner last worked there, and that there was no evidence in the record which would establish Coastal as the owner of Soldier Creek "at this most important time." While Claimant conceded that there was some evidence that Coastal may be a successor Operator pursuant to 20 C.F.R. §725.493(a)(2), Claimant suggested that if the evidence failed to establish that relationship, she would be entitled to benefits payable by the Trust Fund.⁴

The parties agree that the Miner last worked for Soldier Coal, and that at the time he was working for Soldier Coal, it was owned by Sun Oil. The parties also agree Soldier Creek was then sold to Coastal, and that Coastal paid some benefits to and for former employees of Sun Oil. The issue here is whether it was the successor operator, such as to render it liable for the payment of black lung benefits.

The testimonial evidence clearly supports a finding that Coastal is a successor operator within the definition of 20 C.F.R. §725.493(a). Thus, while subsection (a)(1) provides that the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than one year shall be the responsible operator, subsection (a)(2) provides that if the operator transferred the "mine or mines or substantially all of the assets thereto to another operator (a 'successor operator'), such successor operator shall be liable for" the payment of benefits.

Given the testimony of the witnesses herein, I find that Sun Oil transferred the mines or substantially all of its assets to Coastal. Accordingly, I find that Soldier Creek Coal Company, self-insured through Coastal States Energy Company Co. was properly designated the responsible operator herein.

⁴ The failure of both parties to submit evidence on this issue is not surprising, given that the absence of proof of Coastal being the responsible operator herein assists both parties. If Coastal is found not to be the responsible operator, it is dismissed and freed of any possible liability for payment of benefits. The Black Lung Disability Trust Fund then automatically becomes liable for benefits, given that the Director has determined that both claims at issue herein should be granted.

Duplicate Claim

In the Miner's case, more than one application for benefits was filed. In cases where a claimant files more than one claim and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial unless there has been a material change in condition or the later claim is a request for modification. **Section 725.309(d)**. The Miner filed his first claim in 1992, which was finally denied that same year. His second application, the instant claim, was filed in 1999, not within one year of the prior denial. Therefore, it cannot be construed as a modification proceeding pursuant to Section 725.310(a). According to Section 725.309(d), the claim must be denied on the basis of the prior denial unless there has been a material change in condition.

In **Wyoming Fuel Co. v. Director, OWCP**, 90 F.3d 1502 (10th Cir. 1996), the Court of Appeals for the Tenth Circuit⁵ held that in order to establish a material change in conditions under §725.309, a claimant "must prove for each element that actually was decided adversely to the claimant in the prior decision that there has been a material change in that condition since the prior claim was denied." The court stated as follows:

In order to meet the claimant's threshold burden of proving a material change in a particular element, the claimant need not go as far as proving that he or she now satisfies the element. Instead, under the plain language of the statute and regulations, and consistent with res judicata, the claimant need only show that this element has worsened materially since the time of the prior denial....However, a new interpretation of an old x-ray that was taken before the prior denial or a further blood gas result identical to the results considered in the prior denial does not demonstrate that a miner's condition has materially changed.

The newly submitted medical evidence will be reviewed, therefore, in order to determine whether there has been a material change in conditions. Previously, it was determined that the Miner had failed to establish the existence of pneumoconiosis due to coal mine employment and total disability due thereto.

Newly Submitted Medical Evidence

The record contains readings of chest x-rays conducted on April 7, 1999 and August 25, 1992. Those x-rays were both read as negative by Drs. Wheeler and Scott, both of whom are B-readers and board certified radiologists. (DX 45). Dr. Navani a B-reader and board certified radiologist, read the April 7, 1999 x-ray as negative. (DX 11). Dr. Baldwin also read that x-ray as negative. (DX 12).

Dr. J.M. Poitras examined the Miner on March 30, 1999. (DX 7). Dr. Poitras recorded coal mine employment from 1977 to 1991, and a cigarette smoking history of less than one pack per day from 1950 to 1970. Based upon his examination, which included the taking of a chest x-ray, pulmonary function and blood gas studies, Dr. Poitras diagnosed (1) "A-fib" -

⁵ The Benefits Review Board has held that the law of the circuit in which the Claimant's last coal mine employment occurred is controlling. **Shupe v. Director, OWCP**, 12 BLR 1-200 (1989). The Claimant's last coal mine employment took place in Utah, which falls under the Tenth Circuit's jurisdiction.

structural heart disease, cardiomegaly, from pulmonary hypertension, EKG & chest x-ray; and (2) severe obstructive and restrictive lung disease. Dr. Poitras noted, with respect to the latter condition, that the Miner "only smoked for about twenty years." Dr. Poitras cited the pulmonary function testing, clinical findings, blood gas studies and reduction in diffusing capacity as support for the latter diagnosis. He found the etiology of the diagnosed conditions to be (1) exposure to coal dust as well as other inorganic dusts associated with coal mining and uranium mining; (2) 20 year smoking history; and (3) uranium mining exposure. In his opinion, the Miner had a severe obstructive and restrictive disease, as well as pulmonary fibrosis and a significant reduction in diffusing capacity, leading to markedly impaired physical activity. Dr. Poitras found the restriction and fibrosis "may be in part due to coal dust/etc. but probably due more to uranium exposure." In his opinion, the obstruction was secondary to smoking and fibrosis "(coal dust, uranium)~ 50/50?" A handwritten note, included as part of the exhibit, but not signed by any person, states "Please note that lung disease does not fit criteria for black lung so we have not sent x-ray."

A pulmonary function study conducted on April 6, 1999, produced an FEV1 of 1.49 and an FVC of 2.05. (DX 6). It was found to be invalid by Dr. Fliegelman, who noted less than optimal effort, cooperation and comprehension, citing "no peak." He explained that there was only one tracing submitted with no time volume tracing or record of length of effort. (DX 10). Dr. Fliegelman is board certified in internal medicine, pulmonary disease, and critical care medicine. He found the blood gas study conducted on April 7, 1999 to be valid. (DX 10). That resulted in values at rest of pO2 - 70.1; pCO2 - 37.5, and after exercise of pO2 - 45.8; pCO2 - 35.2. 9. (DX 9). Dr. Fliegelman remarked that it was "surprising to have such severe desaturation but no metabolic acidosis."

A death certificate signed by Edward A. Leis, M.D., Asst. Med. Examiner on June 5, 1999, listed the immediate cause of death as "Pending." (DX 4, 31). The date of death was recorded as June 4, 1999.

An autopsy was performed on June 5, 1999 by Dr. Leis. (DX 5, 32). The immediate cause of death was listed as an acute myocardial infarction due to occlusive coronary artery disease. Listed as "Other Significant Conditions" were cardiomegaly and coal worker's pneumoconiosis. Dr. Leis noted pulmonary changes consistent with coal worker's pneumoconiosis, finding pulmonary emphysema, anthracosis and mild arterial changes. He stated that death was due to acute myocardial infarction, secondary to thrombotic occlusion of the left circumflex artery. Significant blockage of all three main coronary arteries was identified.

A second death certificate, signed by Dr. Leis on July 14, 1999, listed the immediate cause of death as acute myocardial infarction due to occlusive coronary artery disease. (DX 31). Listed as "Other Significant Conditions contributing to death but not resulting in the underlying cause given in Part I," were cardiomegaly and coal worker's pneumoconiosis.

Dr. Joshua Perper submitted a report dated November 11, 1999, after reviewing employment records, the autopsy report, four microscopic slides of the autopsy, chest x-ray, ventilatory and blood gases reports, the report of examination conducted by Dr. Poitras and the death certificate. (DX 33). Upon review of the autopsy slides, Dr. Perper found fibro-anthracosis of pleura, with presence of scattered small birefringent crystals consistent with silica and anthracotic macules located in peribronchial, peri-vascular and within inter-alveolar septa. He recorded that the Miner was obese.

Based upon his review of the medical evidence, Dr. Perper concluded that the Miner had evidence of significant coal worker's pneumoconiosis and/or evidence of other occupational related pneumoconiosis or disease. He based this conclusion upon (1) a sufficient length of verified occupational exposure to a variety of rock dusts, containing coal, silica, heavy metals and uranium over a period of more than fourteen years; (2) clinical symptomatology. Although in his opinion it was likely that a significant part of the exceptional shortness of breath exhibited by the Miner was caused by his heart disease substantiated at the autopsy, he also added that the evidence "unequivocally indicate[d] that pulmonary disease was an equally if no more substantial contributing factor to the patient's dyspnea;" (3) objective examination findings, consistent with pulmonary emphysema; (4) severe obstructive and restrictive lung disease with hypoxemia; and (5) the presence of significant simple coal worker's pneumoconiosis and centri-lobular emphysema in the autopsy slides examined. Dr. Perper noted as follows:

It is true that the patient was a former smoker fifteen (15) years prior to his demise, and that emphysema is equally known to be a complication of smoking. However, this does not exclude the emphysema causing effect of exposure of coal dust exposure, and the scientific literature has confirmed such role beyond any effect of smoking. Furthermore, in the case of Mr. Welch he smoked less than a pack of cigarettes a day and he stopped smoking twenty (20) years prior to his demise.

Dr. Perper opined that the Miner's pneumoconiosis was related to his exposure to coal mine dust, and that it was a substantial contributory cause of death. Dr. Perper based this conclusion on the severe objectively demonstrated obstructive and restrictive pulmonary disease, the finding of pneumoconiosis and associated findings of chronic emphysema, interstitial fibrosis and pulmonary sclerosis consistent with pulmonary hypertension and cor pulmonale. Dr. Perper stated that the occupational pneumoconiosis and associated chronic emphysema and interstitial fibrosis were a substantial cause of death, through severe pulmonary dysfunction and hypoxemia that caused, precipitated or aggravated the episode of fatal myocardial infarction that occurred on the background of severe arteriosclerotic heart disease and related coronary thrombosis and myocardial infarction. Dr. Perper is board certified in anatomical, surgical and forensic pathology.

The deposition testimony of Dr. Leis was taken on January 27, 2000. (EX 1). Dr. Leis is board certified in anatomic, clinical and forensic pathology. Dr. Leis testified that the Miner's death was sudden and unexpected, which triggered Utah's Medical Examiner's Act, resulting in an autopsy being performed. At the time of the autopsy, Dr. Leis had no other medical records. Dr. Leis reiterated that the immediate cause of death was acute myocardial infarction due to occlusive coronary artery disease. With regard to the listing of coal worker's pneumoconiosis on the death certificate, Dr. Leis testified that this was based upon the history of coal mine employment and the gross and microscopic examination of lung tissue. The lung surfaces "were almost completely black," there was "black anthracotic pigment trapped in tissue which was focally scarred, and there were some associated changes of emphysema."

When asked if the Miner's simple coal worker's pneumoconiosis caused death, Dr. Leis responded as follows:

Because of the way I put it on the death certificate, it would have contributed to it. Had he not had this condition, he still would have died of its underlying causes.

Dr. Leis explained that the Miner's pneumoconiosis caused some impairment in his ability to oxygenate his blood and increased his susceptibility to heart damage associated with his coronary artery disease. In the instant case, pneumoconiosis was a contributory factor because it was present and it contributed to some pulmonary problems, which would have had a bearing on the Miner's heart condition. When asked if pneumoconiosis hastened death, Dr. Leis stated that it did not "speed up" the Miner's development of cardiovascular disease.

Attached to the deposition as an exhibit is a letter from Dr. Leis to a Becky Rockwell, CFI, advising her that he had re-examined the microscopic slides of the lung tissue of the Miner regarding her "concerns of needing a diagnosis of pulmonary fibrosis for [her] uranium mining claim before the U.S. Department of Justice." Dr. Leis advised that he found no significant evidence of pulmonary fibrosis and therefore he could not make such a diagnosis "to assist with [her] claim."

By report dated February 15, 2000, Dr. P. Raphael Caffrey indicated that he had reviewed the medical evidence of record, including the autopsy report, four autopsy slides and the report of Dr. Perper. (DX 45). Upon microscopic examination, Dr. Caffrey found a mild degree of centrilobular emphysema present, and a mild amount of anthracotic pigment noted subpleurally, around blood vessels and respiratory bronchioles. His final diagnosis, based upon his review of the slides, included (1) simple coal worker's pneumoconiosis, mild; (2) centrilobular emphysema, mild; and (3) mild, focal sclerosis of blood vessels. Dr. Caffrey relied upon the work, smoking and medical histories set forth in Dr. Perper's report to render his opinion regarding the Miner's cause of death. It was his opinion, that simple coal worker's pneumoconiosis did not contribute to, cause or hasten death. Dr. Caffrey opined that Claimant died of coronary artery thrombosis with secondary acute myocardial infarction. Dr. Caffrey explained:

There is definitely no cause and effect relationship between coronary artery atherosclerosis, myocardial infarction, and simple coal worker's pneumoconiosis. There is no association between working in a coal mine or uranium mine and the development of coronary artery atherosclerosis and/or myocardial infarction.

Dr. Caffrey opined that if the Miner had the marked impairment due to severe obstructive and restrictive disease, pulmonary fibrosis and significant reduction and diffusing capacity, as found by Dr. Poitras, it was "definitely not due to the amount of simple coal worker's pneumoconiosis he had." Dr. Caffrey added that the Miner had a "significant smoking history of twenty years plus." He found it quite likely that the Miner may have had pulmonary congestion or edema secondary to his heart disease. The Miner's centrilobular emphysema was due to his cigarette smoking. Dr. Caffrey stated his disagreement with Dr. Perper's conclusion that pneumoconiosis was a substantial contributory cause of death. It was his opinion that the Miner had significant pulmonary impairment from his years of smoking cigarettes, "probably compounded by the fact that he had coronary artery disease which may well have caused him to have some degree of congestive heart failure." Dr. Caffrey concluded as follows:

In conclusion [the Miner] did have a mild degree of simple coal worker's pneumoconiosis in my opinion, and he had centrilobular emphysema of a mild degree, in my opinion. I cannot prove whether the centrilobular emphysema was due to his cigarette smoking, which I believe it was, with possibly a minor contribution from the coal worker's pneumoconiosis. It is my opinion though,

that the mild degree of simple coal worker's pneumoconiosis did not contribute to, hasten, or cause his death.

Dr. Caffrey is board certified in anatomical and clinical pathology.

Dr. Richard L. Naeye submitted a report dated March 7, 2000, after reviewing evidence which included the autopsy report, four slides of lung tissue, the death certificate, employment information, chest x-ray readings, pulmonary function and blood gas studies and Dr. Perper's report. (EX 2). Based upon his review, Dr. Naeye found simple coal worker's pneumoconiosis to be present. In his opinion, the coal worker's pneumoconiosis which was present was far too mild to have produced any measurable effects on lung function, caused any disability, prevented the Miner from coal mining or hastened death in any way. Dr. Naeye concluded as follows:

Myocardial malfunction due to severe coronary arteriosclerosis, damage to the microcirculation of his heart by cigarette smoking and at the end a coronary artery thrombosis were responsible for his atrial fibrillation, wheezing, dyspnea on minimal exertion, occasional orthopnea and arterial oxygen desaturation at rest and with exercise in the period before he died. I do not agree with the opinions of Dr. Joshua Perper that attribute many of these latter problems to CWP. This man's CWP was far too mild to have produced the effects attributed to it by Dr. Perper. None of the interstitial fibrosis that can be produced in the lungs by exposure to hard rock dusts is present in the lung tissues of this man.

Dr. Naeye is board certified in anatomic and clinical pathology

Dr. Leon Cander submitted a medical report dated July 13, 2000. (DX 49). Dr. Cander is board certified in internal medicine. Based upon his review, which included a review of the Miner's work and smoking histories, chest x-rays, pulmonary function and blood gas testing, the medical report of Dr. Poitras, the autopsy report of Dr. Leis, and the reports of Drs. Naeye, Caffrey and Perper, Dr. Cander concluded that the Miner had coal worker's pneumoconiosis caused by the occupational inhalation of coal mine dust. It caused hypoxemia severe enough to meet the disability standard of the Federal Black Lung Program, documenting the presence of disabling pneumoconiosis. With regard to the cause of death, Dr. Cander stated as follows:

Although [the Miner's] immediate cause of death was listed as occlusive coronary artery disease causing an acute myocardial infarction, in fact the immediate cause of death was a fatal cardiac arrhythmia which was causally related, at least in part, to the hypoxemia and pulmonary hypertension caused by the coal worker's pneumoconiosis. Thus, [the Miner's] pneumoconiosis contributed significantly as a cause of his death and hastened it.

Attached to his report was the article "An Analysis of the Effects of Smoking and Occupational Exposure on Spirometry and Arterial Blood Gases in Bituminous Coal Miners in Southern West Virginia," authored by Drs. Cander, D.L. Rasmussen, N. Obuchowski and H. Rockette.

Upon reviewing the medical evidence, Dr. Cander opined that the Miner's electrocardiogram revealed possible right ventricular hypertrophy, suggesting the presence of cor pulmonale caused by his chronic lung disease. The autopsy revealed a thickening of both the left and right ventricular wall and the changes in the pulmonary arterioles documented

the presence of chronic elevation of the pulmonary artery pressure and resultant cor pulmonale. The blood gas studies demonstrated that hypoxemia caused by chronic lung disease was the cause of the pulmonary hypertension and cor pulmonale. Dr. Cander stated his disagreement with the finding of Dr. Naeye, that the coal worker's pneumoconiosis present in the Miner was far too mild to have produced any measurable effects on lung function or caused any disability. Dr. Cander stated that it was not possible to predict the degree of bronchial obstruction (if any) and the presence or absence of hypoxemia from the microscopic review of lung tissue of the patient with emphysema, as was the case here.

Dr. Gregory J. Fino reviewed the medical evidence and submitted a report dated July 24, 2000. (EX 3). Based upon his review, Dr. Fino stated his disagreement with Dr. Perper's finding that the Miner had a severe obstructive and restrictive defect on the pulmonary function study. In his opinion, the Miner did not give a good effort on spirometry. Dr. Fino further pointed out that there was no attempt at treatment of the Miner's lung condition with medications. In his opinion, the records clearly showed that the Miner died of an acute myocardial infarction, with no reason to suggest that any type of lung disease contributed to death. Dr. Fino found minimal pneumoconiosis to have been present, however, the disease played no part in the Miner's disability or his death. Dr. Fino is board certified in internal medicine and pulmonary disease.

By report dated October 2, 2000, Dr. Perper stated he had reviewed his prior report, as well as the reports of Drs. Naeye and Caffrey, the deposition testimony of Dr. Leis and the x-ray readings rendered by Drs. Scott and Wheeler. (CX 1). With regard to the opinion of Dr. Leis, that the Miner's simple coal worker's pneumoconiosis did not cause or hasten death, Dr. Perper stated his disagreement. In particular he stated that the response of Dr. Leis was not adequately responsive to the question because speeding the development of cardiovascular disease is not the only mechanism by which pneumoconiosis can hasten a patient's death. The increased susceptibility to heart damage by the coal worker's pneumoconiosis related respiratory impairment "is a reasonable and effective hastening mechanism of death," according to Dr. Perper. Dr. Perper agreed with Dr. Leis, that simple coal worker's pneumoconiosis contributed to the Miner's death by causing some impairment in his ability to oxygenate blood, and increased his susceptibility to heart damage associated with his coronary artery disease. Dr. Perper stated that an increased susceptibility to heart damage can hasten or precipitate death.

Dr. Perper disagreed with Dr. Naeye and while finding Dr. Caffrey's report to present a more balanced view than that of Dr. Naeye, he found similar basic flaws in both. Dr. Perper continued to find that the Miner had severe objectively demonstrated obstructive and restrictive lung disease and hypoxemia, due to significant simple mine worker's pneumoconiosis and associated emphysema, interstitial fibrosis and sclerosis of pulmonary vessels, consistent with pulmonary hypertension and cor pulmonale. Dr. Perper concluded that the Miner's pneumoconiosis was a substantial contributory cause of his death through severe pulmonary dysfunction and hypoxemia.

By report dated October 7, 2000, Dr. Naeye stated that he had received Dr. Perper's second report and the deposition transcript of Dr. Leis. (EX 4). Dr. Naeye stated that the black pigment so easily seen in the lungs by Dr. Leis only rarely had any accompanying fibrosis or a rim of focal emphysema, the latter findings being those which produce lung dysfunction. While Dr. Naeye had no doubt that the Miner had "respiratory signs and symptoms," these were secondary to cardiac damage and failure. Dr. Naeye opined that the Miner had a history of substantial damage to his heart by arteriosclerosis in large arteries and

damage to small arteries and arterioles by his heavy cigarette smoking. This led to atrial fibrillation which led to a reduction in cardiac output and a resulting myocardial insufficiency and heart failure. The result was wheezing, dyspnea on exertion and arterial blood oxygen desaturation which increased with exercise. Dr. Naeye stated that such heart failure increases pulmonary venous pressure with resulting increases in pulmonary arterial blood pressure and produces cor pulmonale. Dr. Naeye found that there was no primary disease, including CWP, in the lungs of the Miner that could have caused chronic cor pulmonale. It was all secondary to his chronic left sided heart failure. Dr. Naeye wrote as follows:

The interstitial fibrosis which Dr. Perper mentions as a consequence of free silica only occurs with very large exposures to free silica over a short period of time. This is a very rare event in coal miners and is *absent* in the present case.

Dr. Naeye also disagreed with Dr. Perper's finding that the centrilobular emphysema present in the lungs of the Miner originated in his exposure to coal mine dust. In his opinion, airway obstruction caused by centrilobular emphysema and bronchitis that is severe enough to be symptomatic is very rare "if indeed it occurs at all in the absence of smoking or complicated CWP." Dr. Naeye found that Dr. Perper had misrepresented the findings. Having reviewed the deposition testimony of Dr. Leis, Dr. Naeye stated that there was nothing therein which he could discuss, because Dr. Leis presented no reliable evidence to support his view that the Miner's simple coal worker's pneumoconiosis was severe enough to have contributed to his death.

In a third report dated October 17, 2000, Dr. Naeye reviewed the report of Dr. Cander. (EX 5). Dr. Naeye voiced his disagreement with Dr. Cander's conclusion that coal worker's pneumoconiosis played a role in the disability and death of the Miner.

Pneumoconiosis

The first step in both claims, i.e., that of the Miner as well as that of his widow, Claimant herein, is a determination of the existence of pneumoconiosis. **See *Trumbo Reading Anthracite Co.*, 17 BLR 1-85 (1993).** Section 718.202(a) sets forth four methods by which a claimant may establish the existence of pneumoconiosis under this part of the regulations. Under Section 718.202(a)(1), a chest x-ray conducted and classified in accordance with Section 718.102 may form the basis for a finding of the existence of pneumoconiosis. None of the x-ray readings submitted since the prior denial showed evidence of pneumoconiosis. Accordingly, I find that the disease has not been established pursuant to 20 C.F.R. §718.202(a)(1).

A biopsy or autopsy conducted and reported in compliance with Section 718.106 may also be the basis for a finding of the existence of pneumoconiosis. 20 C.F.R. § 718.202(a)(2). The autopsy in this case, conducted by Dr. Leis, establishes the existence of pneumoconiosis. This findings is supported by every physician who reviewed the autopsy report and slides, those physicians including Drs. Fino, Naeye, Perper, Cander and Caffrey. Accordingly, I find that pneumoconiosis has been established pursuant to 20 C.F.R. § 718.202(a)(2).

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305 or 718.306 are applicable. No x-ray evidence of complicated pneumoconiosis is present in the record. Therefore, Section 718.304 does not apply. Section 718.305 also does not apply

because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of deceased miners who died on or before March 1, 1978.

The fourth and final way to establish the existence of pneumoconiosis is set forth in Section 718.202(a)(4). This subsection provides for such a finding where a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis. Any such finding shall be based upon objective medical evidence and shall be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. ***Fields v. Island Creek Coal Co.***, 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. ***Id.***

Upon review of the medical opinion evidence, I find that the medical reports establish that the Miner had coal worker's pneumoconiosis. As noted above, every physician found this to be the case. Consequently, I find that the weight of the medical report evidence indicates that the Miner suffered from coal workers' pneumoconiosis. As a result, the existence of same has been established pursuant to 20 C.F.R. § 718.202(a)(4). I further find, pursuant to 20 C.F.R. § 718.203(b), given that the Miner has established over ten years of coal mine employment, that the pneumoconiosis arose at least in part out of coal mine employment. I do not find the contrary evidence herein sufficient to outweigh this finding.

Total Disability

In order to establish entitlement in the Miner's claim, it must be established that the Miner was totally disabled due to pneumoconiosis at the time of death. **20 C.F.R. § 718.204(a)**. For purposes of this section, any non-pulmonary or non-respiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. A miner shall be considered to have been totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented the miner from performing his usual coal mine work and from engaging in gainful employment. **See 20 C.F.R. Section 718.204(b)(1)**. In the absence of contrary probative evidence, evidence which meets one of the Section 718.204(b) standards shall establish the claimant's total disability. It should be noted that total disability cannot be established pursuant to Section 718.304, given that there is no evidence of complicated pneumoconiosis.

Total disability due to pneumoconiosis requires that pneumoconiosis, as defined in §718.201, be a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. A substantially contributing cause is defined as one having a "material adverse effect on the miner's respiratory or pulmonary condition" or one which "materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." **20 C.F.R. §718.204(c)(1)(i) and (ii)**. Absent a showing of cor pulmonale with right-sided congestive heart failure, or that the presumption of §718.305 applies, it is not enough that a miner suffers from a disabling pulmonary or respiratory condition to establish that this condition is due to pneumoconiosis. **See 20 C.F.R. §718.204(c)(2)**. Total disability due to pneumoconiosis must be demonstrated by documented and reasoned medical opinions. ***Id.***

According to Section 718.204(b), the criteria to be applied in determining total

disability include: 1) pulmonary function studies, 2) arterial blood gas tests, 3) a cor pulmonale diagnosis, and 4) a reasoned medical opinion concluding total disability. The one newly submitted pulmonary function study is insufficient to establish total disability, given that it was found to be invalid. The after exercise blood gas study did produce values indicative of total disability pursuant to 20 C.F.R. 718.204(b)(1)(ii). (DX 9) . That study was found to be valid. (DX 10).

A claimant may demonstrate total disability with medical evidence of cor pulmonale with right-sided congestive heart failure in addition to pneumoconiosis. While there is evidence of cor pulmonale, there is no evidence of right-sided congestive heart failure. Accordingly, total disability has not been established pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Finally, a claimant may demonstrate total disability by a reasoned medical opinion which concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in coal mine employment, if the opinion is based on medically acceptable clinical and laboratory diagnostic techniques. The only physician to examine the Miner prior to his death, and since the last denial of benefits, was Dr. Poitras. Dr. Poitras found the Miner to be suffering from severe obstructive and restrictive pulmonary disease, which he found to be due to several factors, including coal dust, uranium exposure, and cigarette smoking. He found the Miner's physical activity to be markedly impaired. Given the physical labor involved in his employment as a coal miner, I find that this finding is the equivalent to a finding of total disability. Thus, the Miner did construction work in the mines, drilling and blasting, as well as running a roof bolter and a shuttle car, (Tr. 36), which I find to be heavy manual labor. While Dr. Poitras appears to discount the role coal mine dust exposure played in the Miner's respiratory condition, he includes coal mine dust exposure as part of its etiology. Accordingly, I find his report sufficient to establish that the Miner's coal mine dust exposure was a contributor to his disability.

Dr. Perper found a severe obstructive and restrictive pulmonary disease, while Dr. Cander specifically found that the Miner suffered from a disabling respiratory impairment as a result of his coal worker's pneumoconiosis. These opinions further support a finding of total disability due to a respiratory impairment.

Dr. Leis, who performed the autopsy, found pneumoconiosis to be present, further concluding that it contributed to the Miner's death. He made no assessment regarding disability prior to death.

Dr. Caffrey opined that the simple coal worker's pneumoconiosis present in the Miner did not cause any impairment he might have suffered as a result of his pulmonary disease. Drs. Fino and Naeye also found that the Miner's pneumoconiosis was too mild to have produced any measurable effects on lung function or caused any disability.

Upon reviewing all of the medical report evidence of record, I find total disability due to pneumoconiosis has been established. In this respect, I credit the opinions of Drs. Poitras, Cander and Poitras. I also take into account the fact that Dr. Poitras is the only physician of record who examined the Miner, and that he did so shortly prior to the Miner's death. His medical examination was thorough and his report well-reasoned and well-documented. His conclusions are supported by the well-reasoned and well-documented opinions of the reviewing physicians, Drs. Perper and Cander, whose excellent qualifications are also taken into account when weighing the medical opinions of record.

Drs. Naeye and Fino specifically rule out any disability due to pneumoconiosis, however, I do not find their opinions as persuasive as those of Drs. Perper, Cander and Poitras. Dr. Caffrey concedes that the Miner had centrilobular emphysema due to cigarette smoking, "with possibly a minor contribution from the coal worker's pneumoconiosis." Dr. Caffrey finds a significant pulmonary impairment from cigarette smoking, yet fails to explain how he rules out coal mine dust exposure as a factor in that disability. I find his opinion is of little assistance herein.

Based upon the reports of Dr. Poitras, Perper and Cander, I find that total disability due to pneumoconiosis has been established pursuant to 20 C.F.R. Section 718.204(b) and (c). In this respect, I find that the Miner's coal worker's pneumoconiosis had a materially adverse effect on his respiratory or pulmonary condition. I further find that the parameters set forth in **Mangus v. Director, OWCP**, 882 F.2d 1527, 1531 (10th Cir. 1989), have been met, inasmuch as the Miner's pneumoconiosis is "at least a contributing cause" to his respiratory disability.⁶

The Benefits Review Board has held that under Section 718.204(c), (now 20 C.F.R. §718.204(b)(2)), all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. **Shedlock v. Bethlehem Mines Corp.**, 9 BLR 1-195, 1-198 (1986); **Rafferty v. Jones & Laughlin Steel Corp.**, 9 BLR 1-231, 1-232 (1987). Furthermore, the Miner must establish total disability by a preponderance of the evidence. **Gee v. W.G. Moore & Sons**, 9 BLR 1-4, 1-6 (1986). In the instant case, when weighing the blood gas studies, pulmonary function studies, the lack of evidence of cor pulmonale with right-sided congestive heart failure, together with the medical opinion evidence, I find that the medical opinions of Drs. Poitras, Perper and Cander and the most recent qualifying blood gas study, outweigh the contrary probative evidence of record, dictating a finding that total disability due to pneumoconiosis has been established pursuant to 20 C.F.R. §718.204(b) and (c).

As the Miner has established every element to entitlement, he has obviously established a material change in condition. I do not find the medical evidence submitted in the prior claim sufficient to outweigh the more recent, obviously more probative evidence regarding his medical condition, submitted with the instant claim. It should be noted, however, with regard to the evidence submitted with the prior claim, that the medical reports of Drs. Lincoln and Farney, as submitted in 1992, were insufficient to establish the existence of pneumoconiosis, and the x-ray readings from 1992 were primarily negative for pneumoconiosis. Blood gas studies conducted on September 18, 1992 produced values indicative of total disability. (DX 28). A study conducted on September 25, 1992 did not. (DX 28). The pulmonary function studies conducted in 1992 failed to produce values indicative of total disability. (DX 28). Thus, it is clear that there was a material change in the Miner's condition since the prior denial. Reviewing all the evidence from the prior and the instant claim, I find that Claimant has established that her husband was totally disabled from coal worker's pneumoconiosis at the time of his death. Accordingly, he was entitled to benefits at

⁶In a recent unpublished opinion, the Tenth Circuit Court of Appeals declined to apply the causation standard set forth in the amended regulations at 20 C.F.R. §718.204(c)(1) and stated, in a footnote, that "[a]s petitioners conceded,...we apply the **Mangus** causation standard that was in effect when [the miner] filed for benefits in 1988." **Pittsburgh & Midway Coal Mining Co. v. Sanchez**, 2001 WL 997947, Case No. 00-9538 (10th Cir. Aug. 31, 2001).

the time of his death. Next to be determined is Claimant's eligibility for benefits.

Death Due to Pneumoconiosis

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, a claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. I have determined, as set forth above, that Claimant has established pneumoconiosis arising out of coal mine employment. Death due to pneumoconiosis may be established by competent medical evidence establishing same, or by evidence that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that the miner's death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205. Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); **Northern Coal Co. v. Director, OWCP**, 100 F.3d 871 (10th Cir. 1996)(a survivor is entitled to benefits if pneumoconiosis hastened the miner's death "to any degree.").

Upon careful review of the record as a whole, including the evidence from the Miner's claim, I find that Claimant has met her burden of demonstrating that pneumoconiosis was a "substantially contributing cause" of death, or that it hastened the Miner's death. In this respect, I find the medical opinions of Drs. Cander, Perper and Leis sufficient to establish that the Miner's coal worker's pneumoconiosis hastened his death. I give great weight to the autopsy report and deposition testimony of Dr. Leis. It was his opinion that the disease impaired the Miner's ability to oxygenate his blood and contributed to his pulmonary problems, which had a bearing on his heart condition. That Dr. Leis opined that it did not "speed up" the Miner's development of cardiovascular disease does not mean it did not hasten his death, as was so aptly explained by Dr. Perper. Dr. Leis's conclusion regarding the role pneumoconiosis played in the Miner's death is supported by the opinions of Drs. Perper and Cander. Dr. Poitras makes no assessment regarding cause of death. I find the opinions of Drs. Perper, Cander and Leis worthy of greater weight than those of Drs. Naeye, Fino and Caffrey on this issue. Therefore, based upon the opinions of Drs. Perper, Cander and Leis, I find that Claimant has established that pneumoconiosis hastened the Miner's death.

Date of Entitlement

Miner's Claim

Benefits under the Act are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. If the date cannot be ascertained, benefits are payable from the first day of the month in which the claim was filed. 20 C.F.R. §725.503(b).

The first evidence of total disability does not, in and of itself, establish the date of onset. It merely indicates that the Claimant became totally disabled at some time prior to the date of the medical evidence. **Merashoff v. Consolidation Coal Co.**, 8 BLR 1-105 (1985). The medical evidence in this case does not establish a date of onset. Therefore, benefits are awardable as of March 1, 1999, the first day of the month in which the claim was filed.

Widow's Claim

Section 725.503(c) of the regulations provides that in the case of a survivor of a miner who dies due to pneumoconiosis, benefits shall be payable beginning with the month of the

miner's death.

Attorney's Fees

No award of attorney's fees for services rendered to Claimant is made since no application has been received. Thirty days is hereby allowed to Claimant's counsel for the submission of such an application. In its preparation, counsel's attention is directed to 20 C.F.R. 725.365 and 366. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. Parties have 10 days following receipt of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Accordingly, Soldier Creek Coal Co. shall:

1. Pay to Linda Welch all benefits to which the Miner was entitled, from March 1, 1999 until the month prior to his death, and all benefits to which she is entitled, commencing June 1, 1999.
2. Pay Claimant's attorney, Martin Linnet, Esq., fees and expenses to be established in a supplemental decision and order.

A
PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.